COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2004AP2961
2005AP775

Cir. Ct. No. 2003CV228

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2004AP2961

LADON LARSON AND CARLA LARSON,

PLAINTIFFS,

V.

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

CHEM-MASTER,

THIRD-PARTY DEFENDANT-APPELLANT,

WEST BEND MUTUAL INSURANCE COMPANY,

INTERVENING-THIRD-PARTY
DEFENDANT-RESPONDENT.

NO. 2005AP775

LADON LARSON AND CARLA LARSON,

PLAINTIFFS,

V.

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

CHEM-MASTER,

DEFENDANT-THIRD-PARTY DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

WEST BEND MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEALS from judgments of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Chem-Master appeals summary judgments granted to West Bend Mutual Insurance Company, both of which denied Chem-Master coverage for a suit brought by LaDon and Carla Larson and their insurer, State Farm Fire & Casualty Insurance Company. Chem-Master essentially argues the trial court misconstrued the policy and the Larsons' claim for damages to arrive at the erroneous conclusion that West Bend had no duty to defend Chem-Master. We conclude Chem-Master's settlement with the Larsons and State Farm renders the appeal moot. Accordingly, we affirm the judgments.

Background

¶2 Fire damaged the Larsons' home. The fire was confined to the basement, but the home's interior surfaces were damaged by soot. The Larsons authorized Chem-Master to repair or replace the damaged surfaces. When odor-reducing paint failed to completely eliminate the smoke smell, Chem-Master returned to apply Valspar WP-1 Super Pinnacle Wood Finish to areas of the basement. WP-1 is commonly used to varnish gymnasium floors, although Chem-Master has used the product in the past without incident. The Larsons authorized State Farm to pay Chem-Master for the repairs.

¶3 After the Larsons moved back into the home, they began experiencing various health problems, including dizziness and headaches. They moved out, believing the WP-1 to be the cause of their illness. Two separate environmental studies, done for the Larsons and State Farm, identified WP-1 vapors in the home. A third study, done for Chem-Master, identified vapors but stated they could be from a source other than the WP-1. State Farm's testing company recommended removing the WP-1; Chem-Master's company concurred.

¶4 The Larsons sued State Farm, alleging it failed to repair or replace the home according to the insurance policy. State Farm impleaded Chem-Master, alleging negligence and breach of contract and seeking contribution or indemnification.[1]

[1] Because of the vapors, the Larsons were advised to replace many things in the home, such as the carpet, where the WP-1 vapors might have accumulated and been trapped, to avoid recurrence of the health problems. Additionally, mold was discovered growing on two walls of one of the basement rooms. This allegedly occurred because water from Chem-Master's initial power washing of the soot-damaged surfaces on the first floor seeped down into the walls and became trapped, providing a hospitable environment for the mold.

¶5 West Bend, as Chem-Master's insurer, contested coverage. It wanted to intervene, bifurcate the coverage and liability issues, and stay the liability phase by stipulation, but Chem-Master refused to so stipulate. West Bend then formally moved to intervene, bifurcate the issues, and stay the liability issue. The court granted the motion. Ultimately, the court determined there was no coverage and no duty to defend Chem-Master and granted summary judgment to West Bend. Chem-Master appealed, and the case was designated case No. 2004AP2961.

¶6 After the stay on the liability question was lifted in the trial court, the Larsons amended their complaint to bring a claim against Chem-Master for "negligent construction." Chem-Master filed a third-party complaint against West Bend and moved for a stay of the appeal. We granted the stay. The trial court, however, dismissed the third-party complaint against West Bend on the grounds of claim preclusion. Chem-Master appealed, and that case was designated case No. 2005AP775.

¶7 Chem-Master also moved for a stay in the trial court pending resolution of the appeals. Before the trial court ruled on the motion, however, Chem-Master settled with the Larsons and State Farm. We consolidated the appeals on our own motion and lifted the stay of the first appeal.

Discussion

¶8 The duty of an insurance company to defend its insured arises implicitly from the insurance contract. *See* ***Mowry v. Badger State Mut. Cas. Co.***, 129 Wis. 2d 496, 510, 385 N.W.2d 171 (1986). Whether an insurer has breached a contractual provision presents a question of law we review de novo. ***Newhouse v. Citizens Sec. Mut. Ins. Co.***, 176 Wis. 2d 824, 833-34, 501 N.W.2d 1 (1993).

The duty to defend is triggered by the allegations within the four corners of the complaint; when the allegations, if proven, give rise to liability under the policy, the insurer has the duty to defend. *See* ***id.*** at 835. However, the insurer "does not breach its contractual duty to defend by denying coverage where the issue of coverage is fairly debatable as long as the insurer provides coverage and defense once coverage is established." ***Elliott v. Donahue***, 169 Wis. 2d 310, 317, 485 N.W.2d 403 (1992). Thus, the proper procedure for the insurer to follow when contesting coverage is to "not only request a bifurcated trial on the issues of coverage and liability, but … also move to stay *any* proceedings on liability until the issue of coverage is resolved." ***Id.*** at 318 (discussing how "[t]o be entirely consistent with ***Mowry***") (emphasis added).

¶9 There is no dispute that West Bend followed the proper procedure in the trial court. But Chem-Master, relying on ***Newhouse***, asserts that because "West Bend failed to ask for a stay of liability during the appeal of coverage issues, it equitably failed to fulfill its obligations under the insurance contract."

¶10 In ***Newhouse***, the insurer refused the trial court's offer to stay the liability phase while an appeal of the coverage determination was pending. The supreme court observed:

> [T]he circuit court's no coverage determination was not a final decision because it was timely appealed. An insurance company breaches its duty to defend *if a liability trial goes forward during the time a no coverage determination is pending on appeal and the insurance company does not defend the insured at the liability trial.* When an insurer relies on a lower court ruling that it has no duty to defend, it takes the risk that the ruling will be reversed on appeal.

Newhouse, 176 Wis. 2d at 836.

¶11 However, ***Newhouse*** does not stand for the proposition that failure to request a stay of the liability determination pending appeal is *per se* an equitable violation. Rather, it follows the rule that if the insured is forced to provide his or her own defense at the liability trial before the coverage determination is final, and it is subsequently determined that there was a duty to defend, the insurer will be liable for the costs of the insured's defense. That is why ***Mowry*** and its progeny recommend bifurcation and a stay: to allow finalization of the coverage determination.

¶12 In ***Mowry***, the court held the insurer had not violated its duty to defend because, once the trial court concluded there was coverage under the insurance policy, the insurer immediately assumed its insured's defense. ***Mowry***, 129 Wis. 2d at 529. In this case, however, even if we hold West Bend has a duty to defend, Chem-Master's settlement has foreclosed any opportunity for West Bend to comply; there is no pending liability proceeding for which Chem-Master requires a defense. This effectively renders the appeal moot because resolution of the coverage issue will have no practical effect on the underlying controversy. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

¶13 West Bend noted, however, that "Chem-Master may argue that a favorable decision from this Court would require West Bend Mutual to pay for the settlement Chem-Master reached with the plaintiffs." It is true that if there is a settlement rather than a liability trial, the insurer who wrongly refuses to defend can be liable for settlement, as opposed to litigation, costs. *See* ***Radke v. Fireman's Fund Ins. Co.***, 217 Wis. 2d 39, 49, 577 N.W.2d 366 (Ct. App. 1998). And, as West Bend anticipated, Chem-Master summarily asserts, "Since West Bend owed a duty to defend Chem-Master, it … is liable to the insured for all

reasonable damages which flow from the breach of contract, including settlement costs and attorneys' fees."

¶14 However, Chem-Master has ignored a portion of the insurance policy which reads:

> **2. Duties In The Event Of Occurrence, Offense, Claim Or Suit**
>
> ….
>
> **d.** No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

The policy then explains that a settlement must be signed by the claimant, the insured, and West Bend.

¶15 Accordingly, West Bend asserts that it "cannot be bound to a settlement agreement that it did not agree to. … Chem-Master settled the underlying case without West Bend Mutual's consent or involvement." Chem-Master does not respond to West Bend's argument that Chem-Master failed to follow the insurance policy's settlement requirements. Unrefuted arguments are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Thus, even if it we were to hold West Bend had a duty to defend, it is not, under these facts, bound by the settlement.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.